The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD A. GEIER, individually and on behalf of all others similarly situated, Plaintiff, v. M-QUBE, INC.; MOBILE MESSENGER AMERICAS, INC., d/b/a MOBILE MESSENGER; and JOHN DOES 1-20, Defendants.	No. 2:13-cv-00354 DEFENDANTS' MOTION TO STAY PROCEEDING PENDING APPEAL NOTE ON MOTION CALENDAR: December 20, 2013

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants m-Qube, Inc., and Mobile Messenger Americas, Inc. d/b/a/ Mobile Messenger ("Defendants"), ask the Court to stay this action pending appeal of the Court's October 17, 2013 ruling, which denied Defendants' Motion to Compel Arbitration or Dismiss Plaintiff's Complaint (the "Order"). The Court should order a stay for the following reasons:

First, when a party appeals the denial of a motion to compel arbitration, a stay pending appeal is warranted as long as the motion to compel presented a "substantial," non-frivolous legal issue as to the arbitrability of the claims at issue. *Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990); *Sample v. Brookdale Senior Living Communities, Inc.,* 2012 WL 195175, at *2 (W.D. Wash. Jan. 23, 2012).

Second, the balance of equities favors granting Defendants' motion to stay. If Defendants must "undergo the expense and delay of trial before being able to appeal, the

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advantages of arbitration — speed and economy — are lost forever," and Defendants would suffer irreparable injury. *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984). By contrast, any delay in proceedings will ***not*** cause substantial injury to Mr. Geier because he "seek[s] only money damages," which "can be recovered through prejudgment interest" in the event he wins on appeal. *Sample,* 2012 WL 195175, at *2; *see also C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 716 F. Supp. 307, 310 (W.D. Tenn. 1989) (cited by *Britton*, 916 F.2d at 1412). Finally, a stay would further the public interest by avoiding potentially needless litigation and furthering the "strong federal policy of encouraging arbitration as a 'prompt, economical and adequate' method of dispute resolution." *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 n.2 (9th Cir. 1992) (citation omitted).

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendants m-Qube and Mobile Messenger are connection aggregators, with whom mobile telephone network operators in the United States directly contract to operate high-capacity connections. Defendants provide "a technology platform or 'gateway' enabling businesses, charities, and other entities (generally referred to as 'mobile content providers') to access customers and send and receive standard …or multi-media messaging through [their] direct connection with the messaging infrastructures of the wireless carriers." Pajaczkowski Decl. [Dkt. 18] ¶¶ 2, 3.[1]

Plaintiff Richard Geier claims AT&T Wireless billed his wife on three occasions for premium mobile content services provided by Pow! Mobile, even though she allegedly did not subscribe to those services. FAC [Dkt. 13] ¶¶ 1.1, 5.22, 5.23. Mr. Geier does not allege Defendants directly offered the text services that are the subject of his Complaint. Instead, he contends Defendants "work with and enable other companies known as content providers to transmit text messages and enroll consumers in text message subscription services." *Id.* ¶ 5.1.

[1] Until recently, Defendants also provided a platform for "premium" messaging services, such as the service to which Mr. Geier's wife subscribed. *See* Pajaczkowski Decl. [Dkt. 180 ¶ 2. In the last few weeks, however, the major U.S. wireless carriers have announced they have discontinued premium SMS services.

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Based on these allegations, Mr. Geier asserts putative class claims under the Washington Consumer Protection Act, RCW ch. 19.86, and for conversion and unjust enrichment.

In accordance with the Terms and Conditions agreed to by Mr. Geier's wife as a condition of subscribing to Pow! Mobile services, Defendants contend Mr. Geier must arbitrate any claims related to Pow! Mobile's services, including the claims he asserts here. Defendants contend they have the right to invoke and enforce the arbitration agreement because: (1) they are express beneficiaries of the Pow! Mobile Terms and Conditions; and (2) Mr. Geier asserts claims intertwined with rights and obligations under the Terms and Conditions, and he therefore should be estopped from avoiding the arbitration obligations embedded in that agreement. *See* Motion to Compel Arbitration or Dismiss Plaintiff's Claims [Dkt. 16].

Defendants moved to compel arbitration on May 17, 2013. Mr. Geier opposed the motion. The Court denied Defendants' motion after oral argument on October 17, 2013. The Court ruled Defendants were not express third-party beneficiaries of the arbitration agreement and were not entitled to invoke the doctrine of "equitable estoppel" to enforce the agreement. *See* Minute Entry of October 17, 2013 [Dkt. 35].

On November 15, 2013, Defendants filed a timely appeal from the Court's Order. They now ask the Court to stay proceedings pending the outcome of that appeal.

III. ARGUMENT

The Federal Arbitration Act ("FAA") provides that a party may appeal immediately from an order denying its motion to compel arbitration. *See* 9 U.S.C. § 16(a). The FAA "represents Congress's intent 'to move parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1153 (9th Cir. 2004) (citation omitted). Further, the FAA "endeavors ***to promote appeals from orders barring arbitration*** and limit appeals from orders directing arbitration." *Id.* (citation omitted; emphasis added).

"In general, filing a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal."

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Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379 (1985) (citation omitted). Where an appeal is taken from a judgment that does not finally determine the action, however, "the appeal does not prevent the district court from proceeding with matters not involved in the appeal." *Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1411 (9th Cir. 1990) (citation omitted). For that reason, Defendants now ask the Court to enter a stay—which courts typically grant in these circumstances.

A. The Court Should Grant a Stay Because Defendants' Motion to Compel Arbitration and Appeal Raise "Substantial," Non-Frivolous Questions.

When a party appeals from the denial of a motion to compel arbitration, the district court should enter a stay pending appeal as long as the motion presented a "substantial," non-frivolous legal issue as to the arbitrability of the claims at issue. *Id.* at 1412. Here, Defendants presented two such issues: (1) whether Defendants are third-party beneficiaries of the Pow! Mobile Terms and Conditions, giving them the right to enforce that contract—including its arbitration provision; and (2) whether Defendants are entitled to enforce the Pow! Mobile arbitration agreement pursuant to the doctrine of "equitable estoppel."

1. Whether Defendants May Enforce the Arbitration Provision as Third-Party Beneficiaries Presents a Substantial Question.

The Terms and Conditions to which Mr. Geier's wife agreed when subscribing to Pow! Mobile's services conferred an explicit, direct benefit on Defendants. The Terms and Conditions provided at the outset that they contain "A WAIVER BY YOU ***AGAINST . . . COMPANY'S SUPPLIERS***" and require "THAT ***ANY DISPUTE*** WILL ONLY BE RESOLVED THROUGH BINDING ARBITRATION." Cacciato Decl. [Dkt. 17] ¶ 30, Ex. A, p. 1 (emphasis added). Later paragraphs reiterated this point, noting that because Pow! Mobile is the only obligor under the agreement, subscribers "VOLUNTARILY, IRREVOCABLY, AND UNCONDITIONALLY RELEASE, ACQUIT, AND FOREVER DISCHARGE AND FULLY WAIVE [any] RIGHT TO BRING ANY LAWSUIT, LEGAL ACTION, CHARGE, DEMAND, COMPLAINT OR CLAIM OF ANY TYPE AGAINST . . . ***ANY OF [Pow!'s] SUPPLIERS***, OR ANYONE OTHER THAN [Pow!]. *Id.* ¶ 33, & Ex. A ¶ 11, p.5. Defendants

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fall within the scope of the waiver. *See* Pajaczkowski Decl. [Dkt. 18] ¶ 4. And Mr. Geier has never denied that the waiver, if enforced, would benefit Defendants as suppliers to Pow!

Defendants provided the Court with substantial authority showing that because this broad waiver covers them, they are express third-party beneficiaries of the Terms and Conditions, including the arbitration agreement. For example, in *Gibson* v. *Wal-Mart Stores Inc.*, 181 F.3d 1163 (10th Cir. 1999), a Wal-Mart employee sued Wal-Mart and a co-employee for an on-the-job injury. Wal-Mart had required the employee to sign a waiver and release in which she "expressly and voluntarily waive[d] and release[d]" any right to sue Wal-Mart or its employees for any work-related injury. *Id.* at 1166. In the release, she "agree[d] to arbitrate any disputes as to entitlement to benefits under Wal-Mart's workers' compensation plan, which shall be a full and final resolution, binding on both parties." *Id.* Given the waiver, the Court found the co-employee a third-party beneficiary and enforced arbitration of the claims against the co-employee. *Id.* at 1170 n.3. Other courts have likewise found that non-parties to a contract qualify as third-party beneficiaries if the contract limits a party's ability to bring claims against those non-parties. *See, e.g., Noveck* v. *PV Holdings Corp.* 742 F. Supp. 2d 284, 298 (E.D.N.Y. 2010) (where settlement agreement was "plainly intended" to prevent plaintiff from pursuing claims against third-party to the agreement, "it is clear from the terms of the [agreement] and the surrounding circumstances that [defendant] is an intended third-party beneficiary, and, as such, it is entitled to enforce the terms"); *see also Tanner Co., Inc.* v. *Reliable Onshore Servs. Co.*, 2008 WL 148073, at *5 (E.D. La. Jan. 11, 2008) (party was third-party beneficiary where parties to the agreement agreed "to release [the non-party] from any and all personal liability"); *Spanierman Galery* v. *Merritt*, 2004 WL 1781006, at *13 (S.D.N.Y. Aug. 10, 2004) (where plaintiff signed a general release agreeing not to pursue claim against any third-party related to ownership of painting, subsequent purchaser was "an intended third party beneficiary of the Agreement").

The Court declined to follow this authority and found Defendants were not third party beneficiaries to the arbitration agreement. In so doing, the Court held that "under Washington

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law both contracting parties must intend that a third-party beneficiary contract be created." Hrg. Tr. [Dkt. 38] 55:18-22 (Ryan-Lang Decl. Ex. A). But the Court recognized Defendants presented a substantial issue on the point. *See Britton*, 916 F.2d at 1412. The Court called the third-party beneficiary issue "very knotty . . . under Washington law," emphasizing the complexity of the issue by noting it had spent "an enormous amount of time reading all of these cases dealing with particularly who is and who is not a third-party beneficiary under Washington law." Hrg. Tr. at 52:11-14; 53:22-23. In the end, the Court appeared to hold Defendants could not enforce the Terms and Conditions as third-party beneficiaries because Defendants did not assume any direct obligations to Mr. Geier. *Id.*

Defendants respectfully contend the cases on which the Court relied in reaching its conclusion do not stand for this broad proposition—and, in any event, they establish Defendants have presented a substantial issue on appeal. In *Lonsdale* v. *Chesterfield*, 19 Wn. App. 27, 31 (1978), which the Court described as "the leading case" in Washington (Hrg. Tr. 57:2-3), the Washington Court of Appeals held only that the "right of a third party beneficiary to sue upon a contract depends, as a rule, upon whether the contract is for his direct benefit or whether his benefit under it is merely incidental, indirect or consequential." In other words, the court in *Lonsdale* did not hold the third-party beneficiary must assume some obligation to one of the contract's signatories. Similarly, the Court in *Rajagopalan* v. *Noteworld LLC*, 718 F.3d 844 (9th Cir. 2013), did not hold that a non-party to an arbitration agreement cannot constitute a third-party beneficiary if it does not assume direct obligations to a signatory. Rather, the Court in that case stressed "no party assumed direct obligations" ***to*** the non-signatory seeking to enforce the arbitration agreement. *Id.* at 847.

By contrast, Mr. Geier's wife here assumed a direct obligation by agreeing to waive all claims against Pow! Mobile's suppliers—including Defendants. (As Defendants have explained, the enforceability of that waiver is a matter for the arbitrator, not the Court, to decide. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448-49 (2006).) No controlling authority in Washington holds that a party in Defendants' circumstances lacks third-

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party beneficiary status; by contrast, relevant authority in other jurisdictions holds non-parties to an agreement covered by a release or waiver of liability ***are*** third-party beneficiaries. In view of the acknowledged difficulty of this issue, Defendants' argument presents a substantial issue warranting a stay pending appeal.

2. Whether Defendants May Enforce the Arbitration Provision under the Doctrine of Equitable Estoppel Presents a Substantial Question.

Defendants' equitable estoppel argument likewise presents a substantial issue meriting a stay. Mr. Geier's claims revolve around allegedly unauthorized charges on his cell phone bill from a short code associated with Pow! Mobile. Hoping to avoid the arbitration agreement in the Pow! Mobile Terms and Conditions, Mr. Geier chose to sue Defendants—but ***not*** Pow! Mobile—even though his claims against Defendants arise entirely out of Pow!'s charges on his phone bill. Mr. Geier alleges "Defendants work with and enable other companies known as content providers [i.e., Pow!] to transmit text messages and enroll consumers in text message subscription services." FAC ¶ 5.1. He repeatedly alleges Defendants worked ***with*** content providers, such as Pow!, in carrying out the allegedly wrongful conduct. *See* FAC ¶ 5.15; *see also* FAC ¶¶ 5.16-17, 5.19.

Based on these allegations, Defendants should have the right to enforce the arbitration agreement because Mr. Geier's claims are "intimately founded in and intertwined with the underlying contract obligations," of which the arbitration agreement is a part. *Amisil Holdings Ltd.* v. *Clarium Capital Mgmt.*, 622 F. Supp. 2d 825, 830-31 (N.D.Cal. 2007); *see also Comer* v. *Micor, Inc.*, 436 F.3d 1098, 1101-02 (9th Cir. 2006) ("[S]ignatories have been required to arbitrate claims brought by nonsignatories at the nonsignatory's insistence because of the close relationship between the entities involved.") (internal quotation omitted). In rejecting the estoppel theory, the Court relied primarily on the Ninth Circuit's recent opinion in *Rajagopalan* v. *Noteworld LLC*, 718 F.3d 844 (9th Cir. 2013). Hrg. Tr. 57:10-19. But in *Noteworld*, the defendant first disclaimed any obligation under a contract—and then later attempted to compel arbitration based on the same contract. As the Court explained, equitable estoppel does not

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permit a party to "claim the benefits of a contract while simultaneously attempting to avoid" its burdens. *Id.* at 847.

Defendants have not engaged in any similar inconsistent conduct. Mr. Geier sued Defendants based on charges for Pow! Mobile's services, and Defendants have ***consistently*** taken the position that Pow!'s Terms and Conditions control. Defendants have at least presented a substantial argument as to why they may invoke the doctrine of equitable estoppel to compel arbitration because Mr. Geier's claims are inextricably linked with his wife's Pow! Mobile contract.

B. The Balance of Equities Favors a Stay.

To determine whether to grant a stay, the Court may consider whether (1) the stay applicant "will be irreparably injured absent a stay"; (2) a stay would "substantially injure the other parties interested in the proceeding"; and (3) "public policy favors a stay." *C.B.S. Employees Fed. Credit Union*, 716 F. Supp. at 310 (cited by *Britton*, 916 F.2d at 1412). These factors weigh heavily in favor of granting Defendants' stay request.

1. Further Proceedings in this Court Pending Resolution of Defendants' Appeal Would Cause Defendants' Irreparable Harm.

Defendants will be harmed irreparably absent a stay because, in those circumstances, litigation of the underlying dispute would proceed, thereby completely depriving Defendants of their asserted contractual right to have the claims arbitrated on an individual basis. If the Court were to deny a stay of the proceedings and later be reversed on appeal on the issue of arbitration, the litigation expenses incurred during trial would defeat the important cost-limiting purpose of arbitration agreements. *See Alascom, Inc. v. ITT North Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984) ("If [a] party must undergo the expense and delay of trial before being able to appeal, the advantages of arbitration — speed and economy — are lost forever."); *Sample*, 2012 WL 195175, at *2 (same); *Lowden* v. *T-Mobile USA, Inc.*, 2006 WL 1896678, at *2 (W.D. Wash. July 10, 2006) (in putative class action, defendants would be significantly harmed if stay not issued pending appeal); *Bradford-Scott Data Corp., Inc. v. Physician*

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Computer Network, Inc., 128 F.3d 504, 506 (7th Cir. 1997) (holding that the benefits of arbitration "are eroded, and may be lost or turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially"). Indeed, the district court in *Noteworld* granted a stay in similar circumstances. *Rajagopolan* v. *NoteWorld LLC*, 2012 WL 2115482, at *3 (W.D. Wash. June 11, 2012) ("Allowing litigation to continue while an appeal is pending on a motion to compel arbitration and where the plaintiff seeks to certify a class of plaintiffs, [defendant] would be irreparably harmed.").

Although litigation expenses may not be deemed irreparable injury in other contexts, "this is a unique situation" because the "main purpose for [Defendants'] appeal is to avoid the expense of litigation," and therefore "the time and expense of litigation do constitute irreparable harm in this instance." *C.B.S. Employees Fed. Credit Union*, 716 F. Supp. at 310; *Baron v. Best Buy Co., Inc.*, 79 F. Supp. 2d 1350, 1353-54 (S.D. Fla. 1999) ("it is difficult to conceptualize how (or why) a district court could (or should) proceed with litigation through final judgment … when the argument on appeal is that the district court is not the proper forum for the resolution of the claims at issue"); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1252-53 (11th Cir. 2004) ("When a non-frivolous appeal involves the denial of a motion to compel arbitration, it makes little sense for the litigation to continue in the district court while the appeal is pending."); *see also Lummus Co. v. Commonwealth Oil Ref. Co.*, 273 F.2d 613, 613-14 (1st Cir. 1959) ("a court order [allowing] discovery would be affirmatively inimical to appellee's obligation to arbitrate, if this court determines it to have such obligation"); *Trefny v. Bear Stearns Sec. Corp.*, 243 B.R. 300, 309 (S.D. Tex. 1999) (same).

2. Any Delay in Proceedings Would Not Cause Mr. Geier Material Injury.

Mr. Geier would not suffer comparable harm if the Court were to grant a stay. Mr. Geier claims only a small amount of damages. FAC ¶¶ 5.22, 5.23. Further, because he seeks "money damages," in "the event [he] prevail[s], any monetary damages caused by the delay of the appeal can be recovered through prejudgment interest, as permitted by applicable

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law." *Sample*, 2012 WL 195175, at *2. Hence, delay in deciding Mr. Geier's claims cannot harm him financially (especially because Mr. Geier on request received refunds of two of the three months he paid for Pow!'s services—and because the major wireless carriers no longer offer the premium services of which he complains). Even if there were some cognizable harm to Mr. Geier from not being able to pursue his $9.99 claim as the result of a stay, his harm does not compare to the unjustifiable waste of time and money that would result from proceeding with this litigation before the Ninth Circuit decides whether this dispute is even subject to judicial resolution. *See*, *e.g.*, *C.B.S. Employees Fed. Credit Union*, 716 F. Supp. at 310 (general disadvantage to plaintiff caused be delay of proceedings was outweighed by potential injury to defendant from proceeding in district court during pendency of appeal).

3. A Stay Would Serve the Public Interest.

A stay would further the public interest because it would promote the important policy goals of judicial efficiency and economy. If the Court did not grant a stay, the Court would have to devote considerable time to deciding motions, including a contested motion for class certification, and supervising discovery—time that could otherwise be devoted to other matters on the Court's docket. It "does not make sense for this Court to expend its time and energy preparing this case for trial and possibly trying it only to learn at a later date from the court of appeals that it was not the proper forum to hear the case." *C.B.S. Employees Fed. Credit Union*, 716 F. Supp. at 310.

A stay also serves the public's interest in promoting the "strong federal policy encouraging arbitration as a 'prompt, economical and adequate' method of dispute resolution." *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 n.2 (9th Cir. 1992) (citation omitted). Because a stay of the proceedings will promote judicial economy and serve the public's interest, the balance of equities favors granting the motion to stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Sample*, 2012 WL 195175, at *2 ("continuing to litigate in this Court during the pendency of the appeal would undermine [the policies of judicial efficiency and economy] . . . The public interest weighs in favor of a stay."). The

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balance of hardships tips decidedly in favor of granting a stay, and when "the public interest is included, that balance is overwhelming." *Lopez v. Hecklet*, 713 F.2d 1432, 1438 (1983).

IV. CONCLUSION

For these reasons, Defendants respectfully request that the Court enter an order staying proceedings pending disposition of their appeal to the Ninth Circuit.

DATED this 5th day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2013, I electronically filed the foregoing *DEFENDANTS' MOTION TO STAY PROCEEDING PENDING APPEAL* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 5th day of December, 2013.

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